

# HEINONLINE

Citation: 10 Syracuse J. Int'l L. & Com. 333 1983

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Fri Feb 1 09:21:18 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0093-0709](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0093-0709)

# INTERNATIONAL CONTROL OF ILLICIT MOVEMENT OF THE CULTURAL HERITAGE: THE 1970 UNESCO CONVENTION AND SOME POSSIBLE ALTERNATIVES

Lyndel V. Prott\*

## I. *THE PROTECTION OF THE CULTURAL HERITAGE AS AN INTERNATIONAL PROBLEM*

Although legislative concern to prevent activities that damage the cultural heritage goes back to at least the sixteenth century in Europe,<sup>1</sup> the effect of the greatly increased international and transnational activity this century has meant that many problems are beyond the capacity of national states to control. There have, therefore, been many attempts to use international law for the protection of the cultural heritage to formulate agreed policies on activities affecting the cultural heritage. This movement has created some difficult issues for governments where cultural matters have traditionally not been a subject for government regulation. Most common law countries are in this group. Nevertheless, the use of legislative controls in new areas is an inevitable phenomenon: it is not so long, after all, since governments have been active in the field of public health. Indeed, there are many other areas, traditionally considered as matters for the internal policy-making processes of a state, that have now become matters of international law and have created obligations for states to act within their borders, in ways which may or may not be in conformity with their historic methods of resolving problems in the area. This is true of areas such as: human rights, which have important implications for national constitutional law; environmental law, which inevitably affects the law of property; and the control of narcotics. The international effect of activities on such matters has now become so significant that only international legal cooperation can give any hope of their resolution.

---

\* Dr. Juris (Tubingen), Licence speciale en droit international (Brussels). B.A., LL.B. (Sydney). Reader in Jurisprudence and International Law, University of Sydney. Visiting Fulbright Senior Scholar, Syracuse University 1982-83.

1. The sixteenth century was the first time in Europe when papal legislation was instituted on this topic.

Although, in recent years, interest has been focused on the problem of illegal export, it is important to see this issue in its proper context. National controls on export were not initiated to ensure the total prohibition of cultural transfers from the country of origin to the countries where there is an interested audience for that culture; such a policy would be self-defeating. There are few, if any, states that would not be pleased to have their culture appreciated in other countries. Export control was, by and large, instituted as a response to the continued looting of archaeological sites and the theft of artistic objects, from both public and private collections, to feed foreign markets. Now other motives have been added, such as the idea of sheltering the national patrimony so that a significant reserve of national cultural materials exists in the country of origin. Again, it is important to see this issue in its context: many of the countries which feel most strongly about the "national patrimony" know that there are far greater collections of their best cultural materials abroad than in their own countries. This has fueled their determination to try to stop *all* traffic in national cultural objects. If they were ever in a situation where they had a national collection which was the best, or was at least a fair representation of the best products of their culture, a more relaxed attitude would almost certainly result in improved avenues of legitimate trade.

A good example of this evolution has been within the People's Republic of China. During the hundred years prior to the Chinese Revolution of 1948, the Chinese had virtually no control over what cultural materials left the country. This situation engendered enormous bitterness and resulted in legislation in 1930, which not only forbade export, but also prevented *any* person of foreign nationality from taking part in any archaeological excavation in China. This legislation also prohibited the transfer of registered objects from private hands to foreign hands within China.<sup>2</sup> Since the Chinese have been pursuing their own cultural policies without outside help since the Revolution and have discovered what an enormous wealth of archaeological and artistic treasures still remains to be studied and cared for, the stridency of their complaints has been less

---

2. *Law on the Preservation of Ancient Objects* 7 June 1930, art. 6 (China); *Detailed Rules on the Implementation of the Legislation on the Preservation of Ancient Objects* 3 July Year 20 [1931], arts. 13, 14 (China).

noticeable. Thus, although export is still strictly controlled, avenues and resources for legitimate traffic in cultural objects are open.<sup>3</sup>

The current concerns of Peru should also be understood in this context. The first legal regulation of the excavation of graves was made by the Spanish in 1575. A later decree was passed in 1822,<sup>4</sup> which forbade the excavation of prehispanic monuments. This law was instituted at the very moment when matters were first amenable to local regulation, as the decree followed three centuries of exploitation of the cultural heritage and excavation of graves for funerary goods, many of which were subsequently melted down for their gold. It was the beginning of a long battle by Peruvian authorities to stop the damage to the local cultural heritage.

A number of decrees, of ever increasing severity, were passed during the nineteenth century, and in 1906 the Peruvian government entered into a contract with the German archaeologist, Max Uhle, to survey, excavate and establish a national collection. Uhle remained in Peru for five years and made a significant contribution to South American archaeology. In 1929, an important law was passed to prevent clandestine excavation and export.<sup>5</sup> A National Archaeological Service<sup>6</sup> was set up to supervise and control excavation, and to authorize only appropriate institutions to undertake digs. The battle against clandestine excavation and illegal export, two practices which have been closely associated from the earliest attempts at legislative control in Peru, became especially bitter in the 1930's, when important collections of Peruvian artifacts were looted: the cemetery of Paracas was illegally excavated and the National Museum's entire collection of 961 gold objects was stolen. Shortly after these thefts, there were sales of Peruvian relics in New York and London.<sup>7</sup> It is hardly surprising that Peruvian attitudes became increasingly more rigid, eventually leading to severe restrictions on the activity of foreign archaeologists. This situation

---

3. For similar conclusions, see Sun, *The Preservation of Cultural Properties in China*, 2 ART RESEARCH NEWS 18 (1983).

4. This legislation was passed during the period of disorder when the Spanish colonies were asserting their independence.

5. *Law No. 6634 of June 13, 1929 for the Defense and Conservation of Archaeological Monuments*, implemented by Decree No. 6938 of Nov. 15, 1980 (Peru).

6. The National Archaeological Service resulted from the proposals of Max Uhle.

7. J.C. TELLO & T. MEJIA XESSPE, *HISTORIA DE LOS MUSEOS NACIONALES DEL PERU 1822-1946, 1938* (Publicaciones del Instituto de Investigaciones Antropologicas No. 10, 1967).

has only recently begun to improve<sup>8</sup> as foreign states have started to show concern for, and to take legal measures against, the use of their territory as a market for goods obtained illegally in Peru. It is too early to say how the situation may evolve, but it is clear that improved cooperation among foreign states to prevent the most blatant abuses, such as those that occurred in the 1930's, will lead to a better atmosphere.

Finally, in this context, one must mention evidence that has been uncovered concerning actual instigation and financing of theft and illicit excavation from abroad.<sup>9</sup> It is a mistake, therefore, to simply consider controls on export and efforts to get international action in support of such controls, merely in the context of some kind of restraint of trade. It is fundamentally linked, and has been since the beginning of the use of law in this context, as a backup to the prevention of illicit excavation and theft.

It is also a mistake to assume, as some writers seem to do, that this is basically a concern of developing states. New Zealand, Canada, and Australia are all states which have recently taken action to control export and to protect their cultural heritage from exploitation, though of course they intend to leave open avenues for legitimate trade.<sup>10</sup> The United States also now has two provisions in its basic legislation on antiquities:<sup>11</sup> one concerns trafficking in goods illegally excavated under federal law; the other concerns trafficking in goods illegally excavated under state law. Moreover, the U.S. penalties are considerably more severe than in many other jurisdictions. It should also be recalled that concern about illicit excavation and export of native American relics, and the consequent damage to sites, was the basis of the now superseded Antiquities Act of 1906.<sup>12</sup>

---

8. Schaedel & Shimada, *Peruvian Archaeology, 1946-80: An Analytic Overview*, 12 *WORLD ARCHAEOLOGY* 359, 362-66 (1982).

9. *See, e.g.*, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). *See also* R. Steinfeld & D. Heath, *An Update on the Cultural Properties Issue* (May 12, 1982) (unpublished paper at Brown University), which provides an interesting description of the mechanics of this process.

The recent theft of valuable objects from an Islamic museum in Israel further illustrates this problem. The police are "investigating the possibility that the robbery was made according to orders placed by unscrupulous collectors . . ." *N.Y. Times*, Apr. 17, 1983, at A12, col. 5.

10. *See, e.g.*, *Antiquities Act*, [1975] 1 N.Z. Stat. 337; *Cultural Property Export and Import Act*, [1975], 1 Can. Stat. ch. 50.

11. *Archeological Resources Protection Act of 1979* § 6, 16 U.S.C. §§ 470ee(b), 470ee(c) (1982).

12. *American Antiquities Preservation Act*, ch. 3060, 34 Stat. 225 (1906).

A large collection of native American artifacts, now in the National Museum of Helsinki, was exported in 1891. This aroused a great deal of controversy at the time and was one of the factors leading to the adoption of the 1906 statute. In view of this incident and the current concern of native Americans to ensure that their cultural heritage is properly protected and cared for, it is not unrealistic to expect increasing pressure on the authorities to prevent the export of those native American artifacts that are still in this country, and to ask other countries for their cooperation in stopping illegal export by instituting and enforcing import prohibitions. In other words, all countries share a concern for the prevention of damaging exploitation of archaeological resources and theft of works of art and relics. The additional concern of states which assert their need to prevent all export is understandable in a historical context, and can be expected to change once countries develop appropriate national collections, and see that other states are cooperating to stop activity which has a serious exploitative effect on the cultural heritage.

It should also be noted that the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>13</sup> was the culmination of a long line of historical development. In August 1922, soon after its founding, the League of Nations considered a report on the serious dilapidations of the cultural heritage. It adopted a resolution recommending international cooperation on this matter. On the initiative of the British Academy, the International Association of Academics adopted resolutions formulated, basically, for the mandated areas.<sup>14</sup> The Treaty of Sévres, which was signed on August 10, 1920, but never ratified, attempted to impose on Turkey certain principles regarding the control of excavations which included restrictions on alienation and export. Although these provisions never became binding on Turkey, they did become binding on Iraq

---

13. Nov. 14, 1970, 823 U.N.T.S. 231.

14. Article 14 of the mandate agreement for Syria-Lebanon, administered by France, included provisions on archaeological excavations and export control which were incorporated in a decree by the French administration. This decree is still in force in Lebanon, although it has been superseded in Syria. Similar provisions were included in article 21 of the Mandate agreement for Palestine, administered by the United Kingdom, which were incorporated into an ordinance. This ordinance has been superseded both in Jordan and in Israel. Detailed information about the legislation currently in force in over 300 jurisdictions around the world, as well as its historical development, is given in L. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION* (1983).

by virtue of a treaty of 1922, between Great Britain and Iraq, which obliged Iraq to adopt an antiquities law based on the provisions of the Treaty of Sévres.<sup>15</sup> This became the basis of the first antiquities law in Iraq.

The 1930's witnessed many other attempts to formally protect the cultural heritage. A draft Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, Which Have Been Lost, Stolen or Unlawfully Alienated or Exported was submitted to the Member States of the League of Nations in 1933, but was not adopted.<sup>16</sup> A draft Convention for the Protection of National Historic or Artistic Treasures was submitted to the Members States of the League of Nations in 1936, and was referred back for further study.<sup>17</sup> A draft Convention for the Protection of National Collections of Art and History, drawn up in 1939, which would have applied only to objects individually catalogued as belonging to a State, but which were stolen and unlawfully expatriated therefrom, was never adopted because of the outbreak of war.<sup>18</sup> Lastly, the Final Act of the Cairo Conference of 1937, which adopted certain international principles applicable to archaeological excavations, formed the basis of the 1956 UNESCO Recommendation on that topic.<sup>19</sup> Thus, the 1970 Convention did not emerge suddenly within the context of UNESCO. It was the end product of a long line of efforts to stop the pillaging and looting of archaeological sites, and the theft of cultural property of extreme importance. Such efforts which had been pursued within the framework of the organized international community ever since such a framework existed and which had frequently been frustrated.

## II. THE UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY<sup>20</sup>

The major international legal instrument which currently operates to protect cultural heritage from the ravages of organiz-

15. 113 BRIT. & FOREIGN ST. PAPERS 652 (\_\_\_\_); see de Visser, *La protection des patrimoines artistique et historique nationaux: nécessité d'une réglementation internationale*, 43-44 MOUSEION 7, 15-16 (1938).

16. 14 LEAGUE OF NATIONS O.J. 1394-96 (1933).

17. 17 LEAGUE OF NATIONS O.J. 1310 (1936).

18. 20-21 LEAGUE OF NATIONS O.J. \_\_\_\_ (1939).

19. M. Pallottino, *Proposals for European Action for the Protection of the Archaeological Heritage*, Council of Europe, Doc. CCCC/AC (65) 13, 5-6.

20. Nov. 14, 1970, 823 U.N.T.S. 231.

ed theft and illicit excavation is the 1970 UNESCO Convention. Whatever other means may have been proposed in the draft instruments that were considered by the League, this convention relies on the enforcement of export prohibitions through the agreement, of other states, to place import prohibitions on material illegally exported from its country of origin. There are many reasons why this concept was difficult for some states to accept, including the fact that some states have traditionally not regulated in this way. Some alarm was expressed at the terms of the original draft, which would have required states to take penal action against persons who acquired goods which had been illegally exported from their country of origin. Two things can be said about fears over possible universal criminal jurisdiction.<sup>21</sup> First, little effort seems to have been put into the question of finding an alternative method to import control for breaking the nexus between illegal excavation or theft, and sale in a foreign market. Second, some of the fears seem to be not well reasoned.

In fact, the proposal did not amount to true universal jurisdiction, because parties would only have imposed a penalty on those who infringed on the import or export prohibition of the country *itself*, not of *any* country whatever. It would not have had the same effect as universal jurisdiction unless every state had adopted the UNESCO Convention, a somewhat unlikely situation, and if each were prepared to prosecute nationals of other states for offenses against the export restrictions of third states. The draft Convention, however, was substantially modified in deference to the views of countries which had difficulties with it, particularly the United States.<sup>22</sup> Many of the amendments consisted of the insertion of phrases such as: "as appropriate for each country;"<sup>23</sup> "consistent with national legislation;"<sup>24</sup> "to the extent feasible;"<sup>25</sup> "consistent with the laws of each State;"<sup>26</sup> or "as far as it is able."<sup>27</sup> These provisions appear to give States Parties great leeway as to how they

---

21. Abramson and Huttler, for example, argued that "[a] new category of international delinquent, the light-fingered curator, was to stand alongside the pirate and the planner of the aggressive wars, subject to universal criminal jurisdiction." Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POLY INT'L BUS. 932, 952 (1975).

22. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 372-76 (1982).

23. 823 U.N.T.S. at 238, 242.

24. *Id.* at 240.

25. *Id.* at 242.

26. *Id.* at 244.

27. *Id.*



implement the Convention, provided always that they undertake some means to prevent the illicit traffic in cultural property, which is the aim of the UNESCO Convention.

It is interesting to look at the way in which the obligations of the UNESCO Convention have been interpreted. Article 7(b)(i), for example, requires states Parties "to prohibit the import of cultural property stolen from a museum, or religious or secular public monument, or similar institutions in another State Party."<sup>28</sup> It seems that a number of European states have interpreted this as meaning that they should institute customs controls at the frontiers to prevent such import. This caused several problems. First, it is contrary to the whole philosophy of much of modern customs administration. The remarks of the Netherlands government, regarding its reasons for not becoming a party to the UNESCO Convention are an example of this interpretation:

With regard to the obligation to prevent the import of movables stolen from museums and the like in other countries, checks by officials have appeared impractical, if not impracticable. Controls, in order to be effective, should imply factual examinations of all transports upon importation, with the purpose of checking whether they contain any goods noted on a world-base as stolen property. In fact, examining shipments on such a large scale as to allow for a deterring effect is regarded neither practically possible nor desirable, because it would considerably hamper the flows of trade. Moreover, the breaking off of tariff and non-tariff barriers between a large number of countries in Western Europe . . . goes along with the desire to simplify or even abolish customs formalities in the relations between these countries, and consequently goods, today, are in fact only examined at random, if at all.<sup>29</sup>

The second problem caused by this interpretation is that eleven European states are now members of the Common Market, and their powers over the institution of customs controls have been handed over, in some part, to the administration of that organization. On the other hand, not all European states currently share the view expressed above. For example, Italy is already a party to the UNESCO Convention, and France has already expressed its inten-

---

28. *Id.* at 240.

29. Comments by the Netherlands government to UNESCO, *quoted in*, L.V. Prott & P.J. O'Keefe, National Legal Control of Illicit Trade in Cultural Property (study commissioned by UNESCO and submitted to a Consultation of Experts held at UNESCO headquarters in Paris, Mar. 1-4, 1983).

tion of becoming a party. France is currently engaged in an examination of its domestic legislation to see whether any amendments will have to be made. Furthermore, Canada became a party to the UNESCO Convention and clearly did not feel that the interpretation suggested above was necessary:

It is not intended . . . to set up elaborate checks on imports at Ports of Entry to enforce this law. First, it is up to the importer to know whether or not the cultural property being imported has legally left its country of origin . . . . Second, the Act provides only for action to be taken when a reciprocating State requests in writing the recovery and return of cultural property illegally imported into Canada.<sup>30</sup>

The Canadian view is that the creation of an offense of illicit import does not involve the examination of all bags for possible infractions. It does ensure, however, that if an offense has occurred, and the evidence comes to light in Canada, the offender can be prosecuted under local law.<sup>31</sup> This is, in fact, what Canada is now doing in the prosecution of a person who imported a Nigerian Nok sculpture without, as the prosecution alleges, the appropriate export authority from Nigeria.

Yet another interpretation of the UNESCO Convention has been made by the United States. According to the Convention on Cultural Property Implementation Act,<sup>32</sup> passed in December 1982, action to recover and return cultural property illegally exported will only be taken when the items concerned have been specifically documented in the inventory of the institution from which they have been taken.<sup>33</sup> This may, for example, seem to exclude material belonging to a church which has not been inventoried in its country of origin. This is an unfortunate restriction because some countries have an enormous amount of material of this kind, and it is a major task to properly catalogue it. Belgium has been engaged in a major task of this kind for some years, and a considerable amount of this material may "disappear" while the inventory is taking place.<sup>34</sup> Many countries simply do not have the

---

30. D.R. CAMERON, AN INTRODUCTION TO THE CULTURAL PROPERTY EXPORT AND IMPORT ACT (1980).

31. Cultural Property Export and Import Act, [1974-1976] 1 Can. Stat. ch. 50.

32. 19 U.S.C. §§ 2601-2613 (1982).

33. 19 U.S.C. §§ 2607; 2610(2)(A).

34. B. BURNHAM, THE ART CRISIS 82-83 (1975). *See also* B. BURNHAM, ART THEFT: ITS SCOPE, ITS IMPACT, ITS CONTROL (1978).

resources to complete such an inventory except over the course of many years, and in many cases there would surely be other acceptable evidence of origin which could be used. A lot depends, of course, on what is accepted to be an "inventory." It may be that "Contents of the Church of St. Mark at the village of Valparaiso" will be accepted as sufficient to satisfy the requirements of an inventory, and that local evidence can be used to prove the identity of the goods in question.

Another point of interest is the United States' interpretation of article 9. Article 9 provides:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.<sup>35</sup>

Section 2602(a)(2) of the U.S. Implementation Act permits the President of the United States to enter into a bilateral or multilateral agreement with a state that seeks U.S. aid under article 9 of the UNESCO Convention. The President's power to enter into such an agreement is limited: the agreement is not to be effective for more than five years,<sup>36</sup> and the President must be satisfied that article 9 of the UNESCO Convention "will be applied in concert with similar restrictions . . . by those nations . . . having a significant import trade" in these materials.<sup>37</sup> The Implementation Act, however, allows action to be taken if the United States would be of substantial benefit in deterring a serious situation of pillage.<sup>38</sup> The five-year period can be extended if the severe situation still remains;<sup>39</sup> but on the other hand, the President may suspend the agreement

---

35. 823 U.N.T.S. at 242.

36. 19 U.S.C. § 2602(b).

37. 19 U.N.T.S. § 2602(c)(1).

38. 19 U.S.C. § 2602(c)(2).

39. 19 U.S.C. § 2602(e).

if he considers that other major importing states are not implementing these import restrictions.<sup>40</sup>

The interpretation of the UNESCO Convention and its significance in the context of international attempts to control damage to archaeological and artistic heritage is important to understand. First, the U.S. legislation requires the State Party to prove that the cultural patrimony is in jeopardy due to the pillage of archaeological or ethnological materials from it.<sup>41</sup> Second, the State Party must have taken measures, consistent with the Convention, to protect its cultural patrimony.<sup>42</sup> Third, the President must find that the imposition of the import restrictions by the United States and other importing states would have a significant beneficial effect.<sup>43</sup> On the other hand, Canada, in its implementing legislation, did not feel that these steps needed to be taken. It clearly felt that these were matters for the judgment of the country of origin, and that a simple request would be sufficient to activate the relevant provisions of the UNESCO Convention.

It may be difficult for many states whose archaeological and legal resources are already severely stretched to mount a campaign in order to convince the U.S. administration that action is necessary. It may well be that such a case can only be provided if foreign archaeologists do it for them. Even the emergency implementation of import restrictions is subject to narrowly defined conditions,<sup>44</sup> and requires the requesting state to supply information "which supports a determination that an emergency condition exists."<sup>45</sup> In its interpretation of the obligations of article 9 of the UNESCO Convention to "take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting States,"<sup>46</sup> the United States has probably taken the narrowest possible interpretation of the article. It remains to be seen whether this interpretation will be accepted by other States Parties to the UNESCO Convention as fulfilling the obligations of that state to the Convention. It must be recalled that the International Court

---

40. 19 U.S.C. § 2602(d)(2).

41. 19 U.S.C. § 2602(a)(1)(A).

42. 19 U.S.C. § 2602(a)(1)(B).

43. 19 U.S.C. § 2602(a)(1)(C)(i).

44. 19 U.S.C. § 2603(a).

45. 19 U.S.C. § 2603(c)(1).

46. 823 U.N.T.S. at 242.

of Justice, in its opinion concerning *Reservations to the Genocide Convention*,<sup>47</sup> held that, while states could limit their obligations to an international treaty,<sup>48</sup> there is a certain core content which parties must accept if they wish other states to acknowledge them as parties to the treaty.<sup>49</sup> A debate could, therefore, take place on how far the obligations of articles 7 and 9 are core provisions of the UNESCO Convention, and how far the U.S. Implementing Act satisfies those obligations.

On the other hand, the important progress which has been made must be clearly acknowledged. This is the first time that a general multilateral treaty has actually been adopted to deal with the severe problems linking theft and clandestine excavation with international trade, despite many previous attempts. The UNESCO Convention now has fifty-one parties,<sup>50</sup> and the new impetus being given by the imminent participation of the United States and France, will probably lead to a considerably greater number of states becoming party to the Convention in the near future. There is also little doubt that the implementation of general international action by way of import controls, especially among the big art-importing states, is in the position of being tested for the first time. It will, if put into effect, enable many important questions to be answered, such as: whether import control is the best way of dealing with this problem; whether it will only lead to the diversion of the flow elsewhere to the detriment of those states who do honestly impose import controls; and, whether evidence of international concern for the problems faced by relic-rich countries will enable them gradually to take a more relaxed attitude about legitimate traffic. All these questions need to be answered: partly because they are, at the moment, subject to unproved assumptions and myth, which only becloud the issue; and partly because, if the answers are unfavorable, we should be looking at other alternatives.

### III. ALTERNATIVE COURSES OF INTERNATIONAL LEGAL CONTROL TO THE 1970 UNESCO CONVENTION

It is worthwhile exploring what other courses of international legal action do exist to remedy the situation if: the UNESCO Con-

---

47. 1951 I.C.J. 15 (Advisory Opinion of May 28, 1951).

48. In the case of the Genocide Convention, states indicated the limitations on their obligations by reservation.

49. 1951 I.C.J. at 21-26.

50. As of May 1983.

vention is not sufficiently widely adopted, its various interpretations are not accepted, or for some reason its implementation proves unsatisfactory. Other measures can also be taken side by side with the UNESCO Convention. As a first step, it should be pointed out that states can evolve satisfactory schemes even without the UNESCO Convention. For example, the Canadian implementing legislation will operate not only in relation to a State Party to the 1970 UNESCO Convention, but in relation to any other international agreement to the same effect.<sup>51</sup> Thus, a regional arrangement, or even a bilateral agreement along the same lines, would be a satisfactory basis for requesting the help of Canada.

Second, major importing states that have difficulties with the UNESCO Convention, for whatever reason, be it philosophical, constitutional or practical, but that agree with its basic aim to save cultural heritage from damaging exploitation, should accept a special responsibility to develop other methods to break the links between theft and illicit excavation in the countries of origin, and in the international market. For example, there are certain countries which supply a great deal of expertise in artworks and antiquities and through which much illicit traffic is directed. Without the services provided by their residents in authenticating, evaluating, restoring, auctioning, and re-exporting such goods, much of the protection and profit of the illicit trafficker would be lost. Furthermore, the publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities, and to attract illicitly acquired goods to the auction and sales rooms of the "art market" states.

It is difficult to escape the conclusion that some members of the trade in art objects are indifferent to the origin of the goods being serviced. Though these dealers and experts prefer not to be engaged in outright dishonest practices, they may not inquire into the provenance or authenticity of an object brought to them for service.<sup>52</sup> Protestations that it is difficult to detect stolen or clandestinely excavated, and illicitly exported goods could be more readily accepted if any real effort were being made to: check provenance,<sup>53</sup>

---

51. Cultural Property Export and Import Act, [1974-1976] 1 Can. Stat. ch. 50.

52. For some examples of this attitude in relation to acquisition, see T. HOVING, KING OF THE CONFESSORS, 63-68 (1981).

53. Dealers in France are required to do so by law.

use the International Art Registry,<sup>54</sup> or encourage and promote the use of export certificates. It is hard not to conclude that a large percentage of persons making their livelihood from activities associated with cultural property in "art market" countries prefer to have these activities unhampered in any way, even if this continues to encourage illicit traffic.

It is worth discussing some of these activities in detail. One activity of importance is that of authentication. Many cultural experts, including some employed by government institutions, other public bodies, museums and auction houses, are consulted for their expert opinion, on the authenticity of particular objects. Though most of this work is perfectly proper use of expertise, it may contribute to the success of the trafficker by improving the value of an object which has not good provenance, and by lending a spurious respectability to it. This is particularly true for goods obtained by clandestine excavation or theft. Thus, a statement by a respected expert that a given antiquity belongs to a specific period and a particular culture, where the provenance of the object is dubious, is certain to improve its marketability. The Australian Museum has stated that it will not authenticate cultural property which does not meet its criteria for acquisition,<sup>55</sup> nor will it provide information about where such authentication may be obtained. Apparently, there is an "upper crust" of art dealers who will guarantee the authenticity and provenance of every work sold.<sup>56</sup> There are, however, in many "art market" states, generally no laws that *require* a dealer to give those guarantees,<sup>57</sup> much less any control over the issue of statements as to authenticity. It is, however, possible for a state to encourage museums and other institutions within its borders to adopt policies similar to that of the Australian Museum.

Similar issues arise in respect of the evaluation of cultural goods. The Australian Museum in its policy statement has also declared that it will not make monetary valuations of cultural prop-

---

54. L. ADAMS, ART COP 57-59, 67-70 (1974).

55. AUSTRALIAN MUSEUM, POLICY REGARDING ACQUISITION OF CULTURAL PROPERTY (19\_\_\_\_). The Australian Museum has adopted a policy similar to that adopted by many American institutions to try to prevent feeding the trade in illicitly obtained goods. Examples are give in L. DUBOFF, THE DESKBOOK OF ART LAW 1169-83, (1977).

56. B. BURNHAM, THE ART CRISIS 93 (1975). Burnham states that the dealer will guarantee that "the work is indeed what the dealer says it is" (authenticity), and that "the work has indeed been in all the previous collections listed, and that its history as presented is, to the dealer's knowledge, authentic" (provenance). *Id.*

57. France is an exception to this, but is apparently ignoring the requirement in practice.

erty, nor will it give information as to where such valuations may be obtained. The same considerations apply to evaluation as apply to authentication. It might be added that the practice of certain "experts" in acting as appraisers in connection with particular dealers has already proved unfortunate with respect to works which are of doubtful attribution, or have been "restored."<sup>58</sup> It should be noted that the American Institute for Conservation of Historic and Artistic Works provides in its Code of Ethics "the issuing of paid expertises or authentications may involve conflict of interest and is not an appropriate or ethical activity for a conservator."<sup>59</sup>

Objects which have been illicitly exported after being stolen or clandestinely excavated are often sent to another country for restoration. In a restorer's workshop in Munich in 1973, an ancient bronze sculpture reputedly by Lyssippus, first became widely known, although it had apparently been found in waters off the Italian coast in 1964, bought by a dealer, sold to a South American collector, and then resold by him to an English firm, who then sent it to the restorer.<sup>60</sup> The Sivapuram Nataraja sculpture, illegally exported from India, apparently began its complicated journey when it was sent to a restorer for treatment and was shipped to a professional bronze restorer in England in 1974.<sup>61</sup> It is also true that "restorers" are sometimes used to camouflage stolen goods and that police are often able to trace stolen goods by checking on suspect "restorers." Dishonest dealers may also substitute copies for genuine work at this stage. Note that the American Institute for Conservation of Historic and Artistic Works in its Code of Ethics regards authentications, appraisals for a fee, and engaging in art dealing, as inconsistent with the professional activity of conservators.

A person who has illicitly acquired cultural goods may wish to send them for sale to an "art market" state. At present there is no requirement in these states for a dealer to see a valid export certificate, even for works which are patently of foreign origin and recent arrival. Article 10(a) of the 1970 UNESCO Convention requires State Parties to:

---

58. See the account of the relationship between Bernard Berenson and the dealer Joseph Duveen in *SECRET, BEING BERNARD BERENSON* 232-74 (1979).

59. AMERICAN INSTITUTE FOR CONSERVATION OF HISTORIC AND ARTISTIC WORKS CODE OF ETHICS art. v.c. (19\_\_\_\_).

60. *The National Times* (Australia), Dec. 26, 1977, at 10.

61. An account of this case is given in B. BURNHAM, *supra* note 56, at 87-93 (1975).



oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject.<sup>62</sup>

France has legislation that requires the registration of traders and the keeping of purchase records by traders in movable objects. The French law also requires dealers to make inquiries as to provenance, and to guarantee title.<sup>63</sup> In other countries, many professional groups are subject to registration, self-regulation, or government supervision. There may also be, of course, police surveillance of dubious dealers, but generally dealers are not required to guarantee provenance.

The use of auction houses by illicit traffickers to dispose of their goods is also not difficult. The world's largest auction houses, situated in London, are subject to very little control. Traditionally, they have satisfied themselves that the seller is the *prima facie* owner of the piece, and that is all. They are not required to guarantee title or examine provenance, although they may include in the catalogue such details as are known to them. The auction houses usually include in their conditions of sale an exclusion of responsibility for genuineness, authorship, provenance, etc.<sup>64</sup> Though recently there has been more finesses applied to the process (e.g. by the publication, in sale catalogues, of a glossary of terms in which delicate nuances convey thin shades of doubt on these matters), this is hardly an impediment to the auctioning of goods of suspect origin. The result is that illegally acquired goods are passed on through the auction houses without difficulty. Consider the extraordinary case of *Winkworth v. Christie, Manson & Woods Ltd.*,<sup>65</sup> where the original English owner of a collection of miniatures was unable to regain them when they appeared at an English auction house a few years after they had been stolen from him. The current vendor derived his title from a transaction in Italy, where the thief had evidently passed them on. Under Italian law, his ownership was

---

62. 823 U.N.T.S. at 243.

63. Law of 15 February 1898, Decree 70,788 of 27 August 1970 (France); see also the *Regles de la Profession d' Antiquaire et Negociant en Oeuvres d'Art Tableaux Anciens et Modernes*, text given in CHATELAIN, FORGERY IN THE ART WORLD Annex 6 (1976).

64. J. BROUGH, AUCTION 171 (1963).

65. [1980] 1 Ch. 496.

protected by the *bona fide* purchaser rule. The result of this bizarre ruling suggests that unique and easily identifiable goods of cultural importance can be auctioned every few years without any hindrance, if the thief takes the precaution of "laundering" them through a jurisdiction which has a *bona fide* purchaser rule and the appropriate interval is allowed to elapse. In France auctioneers are subject to much more stringent conditions regarding guarantee of title, but it seems that these statutory requirements have been weakened by judicial interpretation.<sup>66</sup>

It can be readily seen, therefore, that there is at present, little to hinder the use of the services provided by "art market" countries to illegal traffickers. If states want to have an alternative to the UNESCO Convention, or a supplementary system of control, moves could be made to unify rules in these countries on the provision of these services, with the aim of ensuring that they are not used for the benefit of the illicit trade.

There is yet another method that could be used to stop the wealth of art collectors in the importing states from being implicated in damage to the cultural heritage. It is clear that attempts to stop trafficking have often encountered problems of differing types of regulation in other states, which enable the dishonest to "shop" for jurisdictions. A typical example is the variation in the period of limitation in regard to the restitution of stolen property, and the refusal by courts of one state to pay attention to another state's restrictions on alienability. There may be good reasons for the rules in each jurisdiction, and it may be that there would be serious inconvenience in trying to alter them. Nevertheless, a good case could be made for doing so, *at least in regard to cultural goods of great importance*. Although these procedural rules are, at the moment, the subject of private international law, they can become public international law through the simple process of treaty-making. As many states have expressed their deep concern about what is presently happening to the cultural heritage, this is a method which could be explored. Along with rules pertaining to inalienability and prescription, attention could be paid to: the recognition and enforcement of foreign judgments, standing to sue, the law to be applied to the transfer of movables, the rules as to restitution, and confiscation, or damages which affect the return of cultural prop-

---

66. CHATELAIN, *supra* note 63, at 110-13. For a comparison with the auction law in the European states, see *id.* at 110-19.

erty. Another area which should be looked at is the *bona fide* purchaser provision which operates in many countries. At least in relation to valuable items of cultural property, it would seem appropriate to require a person claiming the benefit of such a provision to prove that he had made some inquiries as to provenance. An international agreement could be made along these lines, which have already been suggested in a broader context, by UNIDROIT's draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables.<sup>67</sup> Of course, these are only suggestions, and much more work needs to be done on all these proposals before they can become the subject of an international legal instrument. Still, it is important to point out that the 1970 UNESCO Convention is not the only answer. If international law now has to be employed to deal with a serious problem of concern to all states, there are many possibilities. The existing framework should not stop us from exploring other possibilities.

Finally, it should be noted that the Council of Europe is working on a draft Convention for the Suppression of Offenses against Cultural Property. The purpose behind this Convention is to make certain offenses against cultural property, such as clandestine excavation, punishable by ensuring that the principles of cooperation in criminal matters, already in force in Europe, are applied to and, where necessary, specifically tailored to, offenses against cultural property.<sup>68</sup> Although a good deal of work has been done on the Convention, it appears to be taking a number of years to come to fruition, for reasons which are not altogether clear.<sup>69</sup>

#### IV. CONCLUSION

Legal measures can be supplemented by other measures. For example, aid to museums in countries of origin in the cataloguing of holdings, in their conservation and in local education, could take a great deal of strain off their resources and help engender a cooperative spirit which would lead to less suspicion and bitterness, and more understanding of the legitimate interests of both art-exporting and art-importing states. Some institutions are already

---

67. The operation of these rules and suggestions for their improvement is discussed in some detail in National Legal Control of Illicit Traffic, *supra* note 29.

68. Dockx, *The Council of Europe's Draft Commission on Stolen Art*, 2 ART RESEARCH NEWS 12 (1983).

69. See Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYR. J. INT'L L. & COM. \_\_\_\_ (1983).

providing such help, but more can be done. Help with museum security, for example, may avoid problems of theft from National collections which are in nobody's interest but the illegal trafficker's. Aid to impoverished local populations who, at the moment, are easily persuaded to engage in clandestine activity by traffickers prepared to dispense a little money could provide alternative sources of income and prevent much damage. Assistance to the administration or particular relevant officials, in art-exporting countries, to devise appropriate methods of controlling export would also help.

The circulation of illicitly acquired cultural property is everyone's problem. The sale to, and subsequent return by, a museum in the United States of a mosaic stolen from a site in Syria, is directly counter not only to the interests of both States,<sup>70</sup> but to the interests in the orderly excavation and curation of important cultural works of people everywhere. Because improper activity has gone beyond the capacity of any national state to control, the use of international law to prevent it is in the interests of us all.

---

70. Bator, *supra* note 22, at 284.